SUMMARY OF THE ARGUMENT

The Petition for Writ of Certiorari should be denied for the following reasons:

a. The Second Circuit's decision below was based on well-established, uniform rules of statutory construction, and was, therefore, entirely consistent with this Court's precedent and decisions of the Circuit Courts of Appeals;

b. The Second Circuit's decision does not conflict with any decision of the Circuit Courts of Appeals regarding the definition of the term "underlying" in Item 10(b)(2)(i)(A) of Schedule 14A;

c. The Second Circuit's decision does not conflict with this Court's precedent or the disclosure policies of the federal securities laws;

d. The Petition does not present any important federal question for this Court to consider or resolve;

e. The Petition is nothing more than an attack on the Second Circuit's application of the correct federal regulation to the Proxy Statement and, as such, is not worthy of this Court's time and attention;

(Cont'd)

the first time in his response to petitioners' motion for rehearing in the Court of Appeals" is not "timely" and "precludes [the Court's] consideration"); *Kale v. Combined Ins. Co.*, 924 F.2d 1161, 1169 (1st Cir. 1991) ("A party cannot be permitted to raise a new issue for the first time on a petition for rehearing in the court of appeals.") (internal quotations omitted).

f. A more appropriate and eminently accessible forum exists for arguments seeking to change the federal regulations that govern executive compensation – the SEC, which recently announced the adoption of new disclosure rules governing executive compensation and is seeking public comment on its proposed rules.

REASONS FOR DENYING THE PETITION

I. The Petition Should Be Denied Because the Second Circuit's Decision Is Consistent with This Court's Precedent and Decisions of The Courts of Appeals.

The Petition should be denied because the Second Circuit's decision is consistent with this Court's precedent and the decisions of the United States Courts of Appeals. Although the Petition argues that the Second Circuit's definition of "underlying" has created a conflict warranting Supreme Court review, this argument is based on a mischaracterization of the court's decision. The meaning of the term "underlying" was not at issue below because Seinfeld did not raise it, and the Second Circuit's decision was based on an interpretation of Item 10(b)(2)(i)(A) that was consistent with the well-established rules of statutory construction.

Seinfeld contended that Item 10(b)(2)(i)(A) required Boeing to delimit and disclose the "amount of options" that can be granted under a new stock incentive plan. (Pet'r App. 5a-6a.) Seinfeld argued that Item 10(b)(2)(i)(A) imposed this requirement because "the amount of securities underlying . . . options" in the regulation means "amount of options." (*Id.*) The Second Circuit rejected this argument as contrary to the plain language of Item 10(b)(2)(i)(A) and held that

the at issue language should "be interpreted according to its plain meaning under the regulation." (Pet'r App. 7a (citing cases).)

The lower court's decision is entirely consistent with this Court's precedent and the rulings of its sister courts of appeals. *See, e.g., Bread Political Action Comm. v. Fed. Election Comm'n*, 455 U.S. 577, 580 (1982) (ruling, "Our analysis of this issue of statutory construction must begin with the language of the statute itself, and absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive.") (internal quotations and citations omitted); *Time Warner Entm't Co., L.P. v. Everest Midwest Licensee, L.L.C.*, 381 F.3d 1039, 1050 (10th Cir. 2004) (stating that general rules of statutory construction apply to regulations and interpretation begins "with the plain language of the regulations"); *Idahoan Fresh v. Advantage Produce, Inc.*, 157 F.3d 197, 202 (3d Cir. 1998) (explaining, "every exercise of statutory interpretation begins with the plain language of the statute itself," and "a court may depart from the plain language of a statute only by an extraordinary showing of a contrary congressional intent in the legislative history"); *Frank Diehl Farms v. Sec'y of Labor*, 696 F.2d 1325, 1331 (11th Cir. 1983) (applying rules of construction to interpretation of regulation, ruling: "Our inquiry begins with the language of the statute. In the absence of clearly expressed contrary legislative intention, the plain language of the statute controls its construction."); *Rucker v. Wabash R.R. Co.*, 418 F.2d 146, 149-50 (7th Cir. 1969) (holding same rules of construction applicable to statutes apply to regulations, explaining: "Where statutory language and objective appear with reasonable clarity, they are not to be overcome by resort to mechanical rules of construction, whose function is not to create doubts but to resolve them when the real issue or statutory purpose is obscure.").

Because the Second Circuit's decision is based on legal grounds that are entirely consistent with the decisions of this Court and the courts of appeals, there is no basis for issuing the writ. The Petition should be denied.

II. The Petition Should Be Denied Because No Conflict Regarding the Term "Underlying" Exists.

The Petition argues that a conflict exists regarding the term "underlying" in item 10(b)(2)(i)(A) as purportedly interpreted by the court below. This assertion is wrong for two reasons: (i) the lower court did not consider, let alone decide, the meaning of "underlying"; and (ii) the Petition fails to cite any decision demonstrating the existence of a conflict regarding the term "underlying."

While the Petition cites a plethora of cases that purport to establish a conflict over the term "underlying," none of these cases defines the term or interprets Item 10(b)(2)(i)(A). (*See* Pet. 10-11 (citing *Varghese v. Honeywell Int'l, Inc.*, 424 F.3d 411, 414 n.3 (4th Cir. 2005) (on appeal from employment law verdict where issue was whether options were wages under Maryland law, court defined "strike price" as "the fixed price at which the owner of a stock option can purchase the underlying security"); *SEC v. Yun*, 327 F.3d 1263, 1268 n.6 (11th Cir. 2003) (on appeal from jury verdict against defendants for insider trading, court defined "put option" as "the right to sell a certain quantity of an underlying security to the writer of the option, at a specified price up to a specified date"); *Caiola v. Citibank, N.A.*, 295 F.3d 312, 327 (2d Cir. 2002) (reversing dismissal of § 10(b) complaint against bank, ruling definition of "security" in Exchange Act does not support conclusion that an option "include[es] only transactions that give the holder the right to receive the

underlying securities"); *Kerkhof v. MCI WorldCom, Inc.*, 282 F.3d 44, 53 (1st Cir. 2002) (on cross-appeals from ERISA and COBRA judgments, court noted, "obviously the value of the options [granted to the plaintiff] would depend on the spread between the prescribed exercise price and the price of the underlying stock at some future point, which might be quite high"); *Keeler v. Comm'r*, 243 F.3d 1212, 1216 (10th Cir. 2001) (on review of disallowance of taxpayer's deductions, court used word "underlying" twice: first in noting that the "high volatility of the stocks chosen as the underlying securities in the program ensured that substantial tax losses would be available at year's end"; second, in observing that "[a]lthough option and forward contracts contemplate actual delivery of the underlying commodity or security, delivery was the rare exception in the Merit programs"); *Scully v. US WATS, Inc.*, 238 F.3d 497, 511-12 (3d Cir. 2001) (on cross-appeals from verdict for employee in wrongful termination suit, court held stock options were properly valued, and explained "[o]ptions generally sell for more than their intrinsic value because they offer an investor the opportunity to earn large gains if the underlying security goes up in price . . ."); *Deutschman v. Beneficial Corp.*, 841 F.2d 502, 504 (3d Cir. 1988) (reversing dismissal of §10(b) complaint, holding option traders possessed standing to sue, and explaining that an "option contract gives its owner the right to buy (call) or sell (put) a fixed number of shares of a specified underlying stock at a given price . . ."); *Laureys v. Comm'r*, 92 T.C. 101, 102 (1989) (tax deficiency case in which court provided primer on option trading, explaining: "A stock option is the right to buy or sell a particular stock at a certain price for a limited period of time. The stock in question is called the underlying security.")).)

These cases, all of which the Petition cited as demonstrating a conflict regarding the definition of "underlying" (*see* Pet. 10-13), confirm only that a stock option is a contract or agreement to buy or sell a specified company's stock. While the cases do use the word "underlying," that is their only connection to this Petition. They fail to suggest, let alone establish, a conflict with the Second Circuit's conclusion that Item 10(b)(2)(i)(A) did not require Boeing to delimit and disclose the number of options that could be awarded under its proposed new Plan. The Petition's mischaracterization of the cases cited and the Second Circuit's decision is useless. The writ should not issue because no conflict exists.

Furthermore, the Petition's citation to cases regarding issued stock, stock transfers, shareholder standing, and cash settlements is nothing more than a non sequitor. These cases not only fail to establish a conflict with the Second Circuit's decision below, they have no perceptible relationship to the decision. (*See* Pet. 11-13 (citing *Helvering v. Sw. Consol. Corp.*, 315 U.S. 194, 200 (1942) (deciding that a warrant is not "voting stock" for the purpose of calculating tax obligations); *Decker v. Advantage Fund, Ltd.*, 362 F.3d 593, 596 (9th Cir. 2004) (fraudulent transfer case ruling that "unissued stock . . . only represents portions of equity in the corporation itself"); *Caiola*, 295 F.3d at 327 (holding option trader had standing to maintain § 10(b) and ruling that an option is a "security" even if it is to be settled in cash); *Wolff v. Comm'r*, 148 F.3d 186, 188 (2d Cir. 1998) (reversing tax deficiency, explaining "[c]losure of a future or forward contract by offset results in a capital gain or loss since a sale or exchange occurs when the underlying commodities or

securities are deemed to be delivered on the settlement date") (internal quotations and citations omitted); *Stoller v. Comm'r*, 994 F.2d 855, 856 (D.C. Cir. 1993) (explaining that canceling a contract resulted in dealer charging or crediting account with "the difference between the contract price of the security and its market value at the time of cancellation"); *STAAR Surgical Co. v. Waggoner*, 588 A.2d 1130, 1137 (Del. 1991) (holding former president and CEO could not enforce voting rights of invalidly issued stock); *Anadarko Petroleum Corp. v. Panhandle E. Corp.*, 545 A.2d 1171, 1177 (Del. 1988) (deciding prospective shareholders are not owed a fiduciary duty); *Harff v. Kerkorian*, 324 A.2d 215, 219 (Del. Ch. 1974), *aff'd in part*, 347 A.2d 133 (Del. 1975) (finding convertible subordinated debentures did not afford standing for derivative suit)).)

Because the foregoing cases bear no relationship to the issues raised in Seinfeld's Petition, they also fail to establish any conflict with the Second Circuit's decision below and should be disregarded. The Petition should be denied because no conflict exists between the Second Circuit's decision and decisions of its sister courts of appeals.

III. The Petition Should Be Denied Because No Conflict Exists Between the Second Circuit's Decision and the Disclosure Policies of the Federal Securities Laws and Regulations.

The Petition also attempts to manufacture a conflict by discussing the disclosure policies of the federal securities laws and regulations. Again, no conflict exists. Far from rebuffing the policies behind federal securities law, the Second Circuit simply held that Item 10(b)(2)(i)(A) did not require the Proxy Statement to delimit and disclose the

number of options that could be granted under the proposed Plan. There is no conflict between the Second Circuit's ruling and the broad remedial purposes of the regulations governing proxy statements.

Furthermore, the Petition's attempt to construct a conflict by relying on *Allyn Corp. v. Hartford National Corp.*, No. H 81-912, 1982 WL 1301 (D. Conn. Mar. 30, 1982), is futile. (*See* Pet. 13-16.) The Petition contends that *Allyn* stands for the proposition that a court can impose new substantive duties based on something other than the plain language of a regulation. (*Id.* 14-16.) This argument mischaracterizes the *Allyn* decision.

In *Allyn*, a dissident shareholder challenged a proxy statement seeking the approval of a merger and the nomination of ten unidentified directors. 1982 WL 1301 at *13. The shareholder alleged that the proxy statement violated several proxy rules, including Rule 14a-4 of Schedule 14A which explicitly requires disclosure of the names of persons nominated for directors. *Id.* at *28 (citing 17 C.F.R. § 240.14a-4). In rejecting a defense argument that the individuals being nominated had not yet been selected, the *Allyn* court properly concluded that Rule 14a-4 explicitly requires disclosure of nominees' names and the requirement could not be evaded by a company's failure to make the selection. 1982 WL 1301 at *28. Contrary to Seinfeld's argument, the *Allyn* court did not impose a substantive requirement – the regulation imposed it explicitly.

In the courts below, Seinfeld sought the imposition of a requirement neither explicitly nor implicitly contained in Item 10(b)(2)(i)(A), *i.e.*, a requirement to delimit and disclose the number of options that can be granted under a new

compensation plan. The Second Circuit's refusal to rewrite the regulation to fit Seinfeld's wishes is nothing but a correct application of the rules of statutory construction to Seinfeld's arguments. The decision does not flout or conflict with the remedial purposes of the securities laws.[5]

Because the Petition fails to establish any conflict with the remedial purposes of the federal securities laws, the Petition should be denied.

IV. The Petition Should Be Denied Because It Presents No Important Question of Federal Law.

Contrary to Seinfeld's assertion, the Petition presents no important issue of federal law. (*See* Pet. 6, 16.) Seinfeld's argument, that the definition of "underlying" in Item 10(b)(2)(i)(A) is important, is meritless. The Petition fails to offer the definition of this word and it fails to explain how the use of "underlying" would substantively change the disclosure in proxy statements seeking approval of new compensation plans.

The Petition is silent on these subjects because the definition of "underlying" is not an important question of

5. The lower court's refusal to impose additional requirements not explicitly contained in Item (10)(b)(2)(i)(A) is also consistent with decisions of the Ninth Circuit Court of Appeals and Second Circuit precedent. *See, e.g., Seinfeld v. Bartz*, 322 F.3d 693, 698 (9th Cir. 2003) (rejecting argument that proxy statement should have disclosed the estimated cost of a new compensation plan, holding disclosure was not required under relevant regulation); *Resnik v. Schwartz*, 303 F.3d 147, 152 (2d Cir. 2002) (same).

federal law. A simple application of the rules of statutory construction demonstrates this lack of importance. The plain meaning of the word "underlying" in the context of Item 10(b)(2)(i)(A) is "to support" or "to form the basis or foundation of." WEBSTER'S NEW TWENTIETH CENTURY DICTIONARY, UNABRIDGED 1993 (2d ed. 1983). All stock of a corporation that has not yet been distributed is "unissued." *See* BLACK'S LAW DICTIONARY 1458 (8th ed. 2004) (defining unissued stock as "[s]tock that is authorized by the corporate charter but not yet distributed"). Therefore, until an award under any stock incentive plan is exercised properly, what underlies it is a share of stock that is unissued but "available for issuance." Whether a proxy statement discloses that a certain number of shares are "available for issuance" or "subject to" or "underlie" a plan makes no substantive difference. Because the plain meaning of the term "underlying" is evident and applicable to Item 10(b)(2)(i)(A), there is no reason for this Court to issue a writ to "interpret" this word.

Because the Petition raises nothing more than a question of statutory construction, no important federal law or issue is at stake and granting the writ in this case would not effect any substantive change in the law or the result in this case. The Court should, therefore, deny the Petition.

V. The Petition Should Be Denied Because the Only Question Presented Is Whether the Second Circuit Properly Applied the Admittedly Correct Federal Regulation to the Proxy Statement.

When the Petition is stripped of its rhetoric, the only real question presented is whether the Second Circuit erred in its application of Item 10(b)(2)(i)(A) of Schedule 14A to the Proxy Statement. (*See* Pet. 18-19.) Even if the Second Circuit had erred, Supreme Court Rule 10 is explicit – this

Court will rarely grant petitions based on such errors. As demonstrated above, this Petition offers the Court no reason to make an exception to Supreme Court Rule 10. The court below was required to do no more than apply well-established rules of statutory construction to a federal regulation and apply the equally well-established legal standards for determining whether a proxy statement was materially misleading based on its plain language. The court did so and its correct ruling is amply justified by precedent and the record.

The Petition insists the lower court erred in holding that Item 10(b)(2)(i)(A) did not require disclosure of the amount of *options* that could granted under the Plan. In rejecting this argument, the Second Circuit simply read the regulation and recognized that Seinfeld's argument was contrary to its plain language. As the court explained:

> Attempting to skirt the straightforward language of the regulation, Seinfeld contends that we should read the term 'amount of securities underlying . . . options,' *id.*, to mean 'amount of options. She urges us to make this logical leap and then conclude that the proxy statement was deficient in that it failed to inform investors that a potentially limitless number of options could be issued under the Plan. We reject this argument. When Item 10 is intended to refer to options, it uses the word 'options.'"

(Pet'r App. 5a-6a.) Because the court below did not err and the only issue presented by the Petition is a disagreement with the lower court's conclusion, this Court should deny the Petition.

VI. The Petition Should Be Denied Because Seinfeld's Policy Argument Should Be Presented to the Securities and Exchange Commission, Not This Court.

Seinfeld argues that executive and director compensation, including stock-based incentive awards, are an important national concern, and she is undoubtedly right. Indeed, the SEC agrees with her. The importance of these matters does not, however, mean that Supreme Court review is warranted. In fact, it is unnecessary.

On January 17, 2006, the SEC voted to publish for comment proposed rules that would "amend disclosure requirements for executive and director compensation," and "security ownership of officers and directors." Press Release, SEC, SEC Votes to Propose Changes to Disclosure Requirements Concerning Executive Compensation and Related Matters, Release No. 2006-10 (Jan. 17, 2006). Of particular relevance to the arguments Seinfeld raised below and herein is the proposal that the Summary Compensation Table be revised:

> A dollar value will be shown for all stock-based awards, including stock and stock options, measured at grant date fair value, computed pursuant to Financial Accounting Standards Board's Statement of Financial Accounting Standards No. 123 (revised 2004), Share-Based Payment, to provide a more complete picture of compensation and facilitate reporting total compensation.

Id. To the extent Seinfeld is concerned about improving executive compensation disclosures, the matter is squarely before the SEC now.

The SEC's press release also solicits comments within sixty days of publication in the Federal Register. Seinfeld now has an alternative forum in the SEC to present her arguments and an invitation from the SEC to submit her comments. She can submit her arguments for policy changes, additional substantive requirements and disclosure requirements, if any, to the SEC.

Because the SEC is the most appropriate forum for changes to executive and director compensation, this Court should deny the Petition.

CONCLUSION

For all of the foregoing reasons, the Respondents respectfully request that this Court enter an order denying the Petition for Writ of Certiorari.

Respectfully submitted,

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Supreme Court, U.S.
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No. 05-666

IN THE

Supreme Court of the United States

LEATRICE SEINFELD,

Petitioner,

v.

PAUL E. GRAY, JOHN F. McDONNELL, JOHN M. SHALIKASHVILI, HARRY C. STONECIPHER, JOHN BIGGS, JOHN E. BRYSON, ROZANNE L. RIDGWAY, PHILIP M. CONDIT, KENNETH M. DUBERSTEIN, W. JAMES McNERNEY, LEWIS E. PLATT, and THE BOEING COMPANY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF

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I. THE SEC'S PROPOSED REGULATIONS DO NOT REDUCE THE NECESSITY OF SUPREME COURT REVIEW

The Respondents say that Supreme Court review is unnecessary (Opp. 16), based upon their counterfactual assertion that the Question Presented for Review "is squarely before the SEC now." (Opp. 17). The SEC has published a 370 page proposal to amend the requirements of disclosure of corporate executive compensation. The proposal addresses proxy statements and other reports that the SEC requires. No part of the proposal addresses 17 C.F.R. § 240.14a-101 (Item 10), concerning solicitations for stockholder action to approve corporate executive compensation plans, except for a conforming amendment in Item 10(b)(1)(ii) to change a citation reference from "paragraph (f)(i) of Item 402 of Regulation S-K" to "paragraph (i)(2)" of the same regulation. The Question Presented concerns Item 10(b)(2), not 10(b)(1).

The SEC proposal was posted on its website at *www.sec.gov/rules/proposed.shtml* on January 27, 2006. Rel. Nos. 33-8655, 34-53185, IC 27218; File No. S7-03-06; RIN 2325-A180, *Executive Compensation and Related Party Disclosure*. In stating the Question Presented for Review, the Petition, at *i*, mentioned SEC Chairman Cox's television statement that control of excessive corporate compensation was the stockholders' job and that by implication he meant that it was "not the government's job." In his speech on January 17, 2000, he said of the stockholders, "It is their job, not the government's . . . ," (*www.sec.gov/news/speech/spch011706cc.htm*) making it explicit. One can only conclude that he is aware of this petition and the fact that a stockholder is doing her job. The importance of Supreme Court review is undiminished.

II. PETITIONER RAISED THE ISSUE TIMELY

Respondents argue that the meaning of the term "underlying" in 17 C.F.R. § 240.14a-101 (Item 10(b)(2)(i)(A)) was raised for the first time in Seinfeld's Petition for Rehearing *En Banc*. (*See* Opp. 4 n.4.) They are simply wrong. The term was used in the Complaint, ¶15, and the Amended Complaint, ¶15. (C.A. App. A.13; A.26.) The meaning of "underlying" was raised before the court of first instance. *See* Seinfeld's Memorandum of Law, dated March 19, 2004, at 1 arguing:

> Specifically they [17 C.F.R. § 240.14a-101] require disclosure of the number of shares "underlying such options" and other stock based awards. (Schedule 14A (Item 10(b)(2)(i)(A)) and Item 20). . . . There is a big difference between the number of options that the Company can grant and the number of shares it can issue to honor its obligations when options are exercised.

The Seinfeld memorandum further argued, at 10, that by contrast the "number of shares that can be issued" is not material. It was even discussed at oral argument before the court of first instance. (C.A. App. A. 340-341.) The meaning of "underlying" was also raised before the Second Circuit. *See* Seinfeld's Opening Brief, dated Sept. 14, 2004, at 11 arguing, "It is the number of shares of underlying options . . . that is required by Schedule 14A, not the number of shares available to be issued and delivered, and the lower court committed error in holding otherwise."

Moreover, it is settled law that "parties are not limited to the precise arguments they made below." *Lebron v. National Railroad Passenger Corp.*, 513 U.S. 374, 379, 115 S. Ct. 961 (1995) (internal quotations and citations omitted). Because the meaning of the term "underlying" was an issue raised in the lower court and in the court of first instance, any new arguments that are presented in this petition can be considered by the court.

Furthermore, the lower court held that stating the number of "issuable" shares satisfied the "underlying" requirement. (Petitioner App. 6a-7a.) So, "even if this *were* a claim not raised by petitioner below, we [the U.S. Supreme Court] would ordinarily feel free to address it, since it was addressed by the court below." *Lebron*, 513 U.S. at 379. (Italics in original.)

III. THE MEANING OF THE WORD "UNDERLYING" IS IMPORTANT

The Respondents oppose this Petition claiming that it "raises nothing more than a question of statutory construction." (Opp. 14). Correct statutory construction is fundamental to "a government of laws, not of men." *Patterson v. Shumate*, 504 U.S. 753, 766 (1992) (Scalia, J., concurring). It is grounds for granting a petition (*United States v. An Article of Drug*, 394 U.S. 784, 791 (1969)), especially this one.

The Respondents claim that the Petition itself does not "offer the definition" for the word "underlying." (Opp. 13.) The Petition, at 4, states, "[B]y definition, the underlying shares are what are subject to the option." At page 10 of the Petition, begins a sub-point entitled, "The Meaning of the Regulatory Word 'Underlying'."

The Respondents claim that none of the cases we cite "defines the term". (Opp. 8) Those cases do better than define the term because they illustrate the usage of the term. It is usage that controls the definitions as stated by Horace, and it is usage that guides lexicographers today. The Preface to Webster's Third New International Dictionary (1981, G. & C. Merriam Co.) states:

> In conformity with the principle that a definition, to be adequate, must be written only after an analysis of usage, the definitions in this edition are based chiefly on examples of usage. . . . [N]o

> word has been entered in this dictionary merely on the authority of another dictionary. ...

It is usage that guides courts, too. *Johnson v. United States*, 529 U.S. 694 (2000); *Walker v. Syms*, 76 N.W. 320, 322 (Mich. 1898) (*citing* Horace, *"Usus, quem pene et jus et norma loquendi."*)

The Respondents seek help from Webster's New Twentieth Century Dictionary, Unabridged 1993 (2d ed. 1983), except that the definition that they quote, *i.e.*, "to support" or "to form the basis or foundation of," is inapplicable to the regulation. It would apply if one were to say that calcareous marl and other kinds of limestone are the underlying bedrock of the best vineyards in Burgundy, even if their contribution is uncertain. Hanson, *Burgundy*, pp. 54-60 (2d ed. 1995, Faber and Faber). The word "underlying" may have multiple meanings, but it is not ambiguous. No one will confuse underlying bedrock with underlying assumptions with underlying stock of an option, just as no one will confuse a promissory note with a musical note. The lower court's use of that word transgressed its meaning, and it imposed material impediments to the stockholders' job of controlling corporate compensation.

The Respondents' citation to *Black's Law Dictionary* is even worse, for they agree that the Plan allows cash settlements of stock options without issuing shares (Opp. 1, 3-4), and the reuse of shares from awards that lapse, expire, terminate, are forfeited, surrendered, or cancelled, even if those awards have been expensed against income. (Opp. 2.) The Respondents do not deny that an unlimited number of shares can underlie awards causing unlimited expenses on the Company's financial statements according to Generally Accepted Accounting Principles and unlimited payments of cash settlements. Their contention that the underlying shares

are "available for issuance" for a stock option that will be settled in cash is not only wrong, but it is a matter of substance (Opp. 13-14). If the Proxy Statement had stated the fact that there was no limit to the number of shares underlying options, then the stockholders would have addressed the "important national concern" (Opp. 16), of executive compensation and disapproved the Plan.

CONCLUSION

A petition for a writ of certiorari should be granted.

Respectfully submitted,

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